American Bar Association
www.supremecourtpreview.org

No. 08-310

IN THE
Supreme Court of the United States

POLAR TANKERS, INC.,
Petitioner,
v.
CITY OF VALDEZ, ALASKA,
Respondent.

On Writ of Certiorari
to the Supreme Court of Alaska

BRIEF OF MULTISTATE TAX COMMISSION AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENT

Joe B. Huddleston, Executive Director
Shirley K. Sicilian, General Counsel
Counsel of Record
Multistate Tax Commission
444 No. Capitol St., N.W., Suite 425
Washington, D.C. 20001-1538
(202) 624-8699

March 4, 2009

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES ii

INTEREST OF *AMICUS CURIAE* 1

SUMMARY OF ARGUMENT 4

ARGUMENT 5

Neither the Commerce Clause nor the Due Process Clause Require Outerjurisdictional Taxpayer Activity to be Reflected in State and Local Apportionment Formulas

I. The Due Process Clause Does Not Require Outerjurisdictional Taxpayer Activity to be Reflected in State and Local Apportionment Formulas 5

A. The Minimal Connection and Rational Relationship Requirements are Met 6

B. The Fair Apportionment Requirement is Met 8

II. The Commerce Clause Does Not Require Outerjurisdictional Taxpayer Activity to be Reflected in State and Local Apportionment Formulas 13

A. Regulation of State and Local Apportionment Formulas is Best Achieved through State and Local Legislation 14

B. The Dormant Commerce Clause Does Not Require Outerjurisdictional Taxpayer Activity to be Reflected in State and Local Apportionment Formulas 16

CONCLUSION 17

TABLE OF AUTHORITIES

Page

***Cases*:**

Braniff Airways, Inc. v. Nebraska State Bd. of Equalization and Assessment, 347 U.S. 590 (1954) 17

Container Corporation of America v. *Franchise Tax Board*, 463 U.S. 159 (1983) ..... *Passim*

General Motors v. Roger W. Tracy, Tax Commissioner of Ohio, 519 U.S. 278, 299 (1997) 13,17

Hans Rees' Sons, Inc. v. North Carolina, 283 U.S. 123 (1931) 9,10,11

Japan Line, Ltd. v. *County of Los Angeles*, 441 U.S. 434 (1979) 16,17

Mobil Oil Corp. v. Commissioner of Taxes of Vermont, 445 U.S. 425 (1980) 6,8,16,17

Moorman Mfg. Co. v. Bair, 437 U. S. 267 (1978) 6,10,12,14,15

New Energy Co. of Indiana v. *Limbach*, 486 U.S. 269 (1988) 13

Norfolk Western R. Co. v. Missouri Tax Comm'n, 390 U. S. 317 (1968) 6

Oklahoma Tax Comm'n v. *Jefferson Lines*, 514 U.S. 175 (1995) 8,12

Quill Corp. v. *North Dakota*, 504 U.S. 298 (1992) 6,13

Reeves, Inc. v. *Stake*, 447 U.S 429, 437 (1980) 13

Standard Oil Co. v. Peck, 342 U.S. 382 (1952) 17

Underwood Typewriter Co. v. *Chamberlain*,
254 U.S. 113 (1920)..... 4,10

United States Steel Corp. v. *Multistate Tax Comm'n*,
434 U.S. 452 (1978)..... 1

Western Live Stock v. Bureau of Revenue,
303 U.S. 250 (1938)..... 8,13

***Constitution*:**

U.S. Const. amend. XIV, § 1 6

U.S. Const. Art. I, §8, cl. 3.....13

U.S. Const., amend. X.....13

***Federal Statutes*:**

Title II of Pub. L. No. 86-272, 73 STAT.
555, 556 (1959)..... 14

H.R. Rep. No. 89-952 (1965).....14

***Other Materials*:**

Multistate Tax Compact, Art. I 2

Multistate Tax Compact Art.VII.1.....2

Multistate Tax Commission Reg.
IV.18(Broadcasting).....3

Multistate Tax Commission Reg.
IV.18(Telecommunications) 3

Uniform Division of Income for Tax Purposes Act
§ 10.....10

Uniform Division of Income for Tax Purposes Act
§ 13.....10

Uniform Division of Income for Tax Purposes Act
§ 14.....3,10

Uniform Division of Income for Tax Purposes Act
§ 16(b)(2) 3,10

BRIEF OF MULTISTATE TAX COMMISSION as *AMICUS CURIAE* IN SUPPORT OF RESPONDENTS[1]

INTEREST OF *AMICUS CURIAE*

Amicus curiae Multistate Tax Commission respectfully submits this brief in support of the City of Valdez, Alaska. The Commission agrees with the City, and the Alaska State Supreme Court, that the "port-day" apportionment formula does not offend either the due process or the commerce clause of the United States Constitution. We do not address the tonnage clause question; however, we note that if the Court were to find that the City's tax is unconstitutional under the tonnage clause, the question of whether the tax is constitutionally apportioned would be moot.

The Commission is the administrative agency for the Multistate Tax Compact, which became effective in 1967 when the required minimum threshold of seven states enacted it.[2] Today, forty-seven states and the District of Columbia participate in the Commission. Twenty of those jurisdictions have adopted the Multistate Tax Compact by statute. Another twenty-eight have joined the Commission as either sovereignty or associate members.[3] The purposes of the Compact

---

[1] No counsel for any party authored this brief in whole or in part. Only *amicus* Multistate Tax Commission and its member states through the payment of their membership fees made any monetary contribution to the preparation or submission of this brief. This brief is filed by the Commission, not on behalf of any particular member state. Finally, this brief is filed with the consent of the parties.

[2] *See, United States Steel Corp.* v. *Multistate Tax Comm'n*, 434 U.S. 452 (1978), upholding the validity of the Compact.

[3] *Compact Members*: Alabama, Alaska, Arkansas, California, Colorado, District of Columbia, Hawaii, Idaho, Kansas, Michigan, Minnesota, Missouri, Montana, New Mexico, North Dakota, Oregon, South Dakota, Texas, Utah and Washington. *Sovereignty*

are to: (1) facilitate proper determination of State and local tax liability of multistate taxpayers, including equitable apportionment of tax bases and settlement of apportionment disputes, (2) promote uniformity or compatibility in significant components of tax systems, (3) facilitate taxpayer convenience and compliance in the filing of tax returns and in other phases of tax administration, and (4) avoid duplicative taxation.[4]

Article IV of the Compact contains the Uniform Division of Income for Tax Purposes Act (UDITPA) nearly word for word.[5] UDITPA addresses formulary apportionment for state corporate income and franchise tax bases, and thereby provides a method for the practical application of the unitary business principle to these multistate taxpayers. This Court has recognized the UDITPA formula as "something of a benchmark against which other apportionment formulas are judged." *Container Corporation of America* v. *Franchise Tax Board***,** 463 U.S. 159, 170 (1983).

As the administrative agency for the Compact, the Commission is charged with interpretation of Article IV, UDITPA, through promulgation of proposed model uniform regulations.[6] Certain aspects of both UDITPA and the Commission's model regulations could arguably be considered

---

Members: Georgia, Kentucky, Louisiana, Maryland, New Jersey, West Virginia and Wyoming. *Associate Members*: Arizona, Connecticut, Florida, Illinois, Iowa, Indiana, Maine, Massachusetts, Mississippi, Nebraska, New Hampshire, New York, North Carolina, Ohio, Oklahoma, Pennsylvania, Rhode Island, South Carolina, Tennessee, Vermont and Wisconsin.

[4] Compact, Art. I.

[5] UDITPA has been enacted, in whole or in part, by thirty-four states either as a stand alone statute, as part of the Multistate Tax Compact, or both. *See,* Commerce Clearing House, ¶ 11-520, May 27, 2008.

[6] Compact, Art.VII.1.

analogous to aspects of the City's property tax apportionment formula at issue in this case. Specifically, the UDITPA provision that assigns sales to the destination state also re-assigns, or "throws back," those sales to the origination state if the taxpayer does not have nexus in the destination state.[7] And the Commission has adopted two special apportionment formulas, one for broadcasters and one for telecommunications service providers, that exclude outerjurisdictional property (such as undersea cable or satellites) from the property factor and non-nexus sales from the sales factor.[8]

The importance the Commission attaches to this case is twofold. First, many states have adopted UDITPA and the Commission's model special apportionment regulations for broadcasters and telecommunications providers.[9] To the extent the City's property tax and apportionment formula invoke the unitary business principle in ways that are analogous to these Commission provisions, the case may have direct implications for states' corporate income and franchise tax apportionment structures. Nearly from the inception of the corporate income tax, this Court has applied the unitary business principle equally to corporate income and property

---

[7] UDITPA § 16(b)(2).

[8] *See* Multistate Tax Commission Reg. IV.18(h), Special Rules: Television and Radio Broadcasting § 4(ii)(B)(3) (amended Apr. 25, 1996); Ala. Admin. Code r. 810-27-1-4-.18(h); 006-05-006 Ark. Code R. § 2.26-51-718(d), 1 Colo. Code Regs. § 201-3 (Television and Radio Broadcasting Regulations); Haw. Code R. § 18-235-38-06.04; Mont. Admin. R. 42.26.1101-.1103; N.M. Code R. § 3.5.19.18; N.D. Admin. Code 81-03-09-38; *see also* Multistate Tax Commission, Model Regulation for Apportionment of Income from the Sale of Telecommunications and Ancillary Services §§ 3(i), 3(ii)(I) (approved July 31, 2008); Proposed 830 Mass. Code Regs. 63.38.11.

[9] *Id. See also* Commerce Clearing House, ¶ 11-520, May 27, 2008 (indicating at least 32 states have adopted UDITPA in whole or in part.)

taxes. *Underwood Typewriter Co.* v. *Chamberlain*, 254 U.S. 113, 119-120 (1920). Yet the Court has also recognized differences between the two taxes which can be germane to the application of the principle. *See, e.g.*, *Container Corporation of America* v. *Franchise Tax Board*, 463 U.S. at 187-188.

Second, and more fundamentally, this case is important to the Commission because it may impact states' authority to determine their own tax policies within recognized constitutional limits. The choice of taxpayer activity to be included in, or excluded from, a jurisdiction's apportionment formula is a policy choice of no small consequence. It may reflect that jurisdiction's determination of how best to match taxpayer receipt of the specific benefits the jurisdiction provides, or to cover the type of activity primarily engaged in by the prevalent industry in that jurisdiction. By calling for a judicial determination that a specific category of activity (time outside the jurisdiction) is constitutionally required to be included in an apportionment formula, the Taxpayer in this case is calling for a significant limitation on states' sovereign taxing authority. One of the Commission's primary purposes is to protect state tax sovereignty from interference beyond that which is required under the Constitution.

SUMMARY OF ARGUMENT

The port-days apportionment formula adopted by the City of Valdez does not offend either the due process clause or commerce clause of the U.S. Constitution. The City has determined through its legislative process that the port-day formula reflects the most relevant activity by which to attribute value. Although there may be other formulas that would also reasonably reflect a rough approximation of value, the City's choice is a fair apportionment and is not arbitrary. Nor does the City's formula discriminate or burden interstate commerce. If the City were required to include all days in its formula, some business value would never be subject to tax

and there would be less than full apportionment of the tax base. The creation of this sort of tax advantage for some interstate business would not further the purpose of the commerce clause, which is to preserve competitive national markets.

ARGUMENT

Neither the Commerce Clause nor the Due Process Clause Require Outerjurisdictional Taxpayer Activity to be Reflected in State and Local Apportionment Formulas

The City's apportionment formula is a single factor ratio of days spent in Port Valdez to days spent in all ports.[10] As such, the formula measures a particular type of taxpayer activity: time spent in port. The formula does not add other factors that might measure additional taxpayer activities, such as time spent in all locations (which would include activity on the high-seas), value of freight handled, or other relative revenue, property or payroll measures. The addition or substitution of any one of these other factors could increase the spectrum of activity covered by the formula and cause the Taxpayer's apportioned share of property value attributed to the City to change. Is the City's formula constitutionally infirm because it fails to reflect one or more of these additional types of taxpayer activity, and in particular the activity occurring on the high-seas? Because the formula (1) apportions value that is rationally related to the activities in the taxing state, (2) is fair, (3) has not been preempted by Congress, and (4) does not discriminate against interstate commerce, the answer is "no."

I. The Due Process Clause Does Not Require Outerjurisdictional Taxpayer Activity to be Reflected in State and Local Apportionment Formulas

[10] *See,* Brief for Respondent, City of Valdez, pp. 4-5.

The due process clause prohibits a state from "depriv[ing] any person of life, liberty, or property, without due process of law." U.S. Const. amend. XIV, § 1. "Due Process centrally concerns the fundamental fairness of government activity." *Quill Corp.* v. *North Dakota*, 504 U.S. 298, 312 (1992).

A. The Minimal Connection and Rational Relationship Requirements are Met

The due process clause requires two conditions be met in order for a state to tax a portion of the value or income generated by a business operating in interstate commerce. There must be (1) a "minimal connection," or "nexus," between the interstate activities and the taxing state, and (2) a rational relationship between the income or property values attributed to the state and the intrastate values of the enterprise. U.S. Const. amend. XIV, § 1; *Mobil Oil Corp. v. Commissioner of Taxes of Vermont*, 445 U.S. 425, 437 (1980); *Moorman Mfg. Co. v. Bair*, 437 U. S. 267, 272-273 (1978); *Norfolk Western R. Co. v. Missouri Tax Comm'n*, 390 U. S. 317, 325 (1968).

The first requirement, nexus, imposes the limitation that a jurisdiction may not tax even a properly apportioned share of the income or values of a unitary business unless at least some part of that business is conducted in the jurisdiction. *Container Corporation of America* v. *Franchise Tax Bd.*, 463 U.S. at 166. Taxpayer has conceded both due process and commerce clause nexus in this case.[11]

The second requirement, regarding a rational relationship, is best thought of as a limitation on the scope of the income or value that may be properly subject to apportionment. This limitation requires that the business's income or value producing activities conducted outside the jurisdiction be related

[11] *See*, Brief for Respondent, City of Valdez, p. 33.

in some concrete way to the business's income or value producing activities conducted inside the jurisdiction. *Container Corporation, supra* at 166. That is, the out-of-state activities of the business must be part of the same unitary operation as its in-state activities in order for the income or value arising from the whole of these activities to be properly apportioned together as the income or value of a single unitary business, using a single apportionment formula. The operation of the Taxpayer's vessels on the high-seas is part of a continuous stream of operation that includes the operation of the vessels in the City of Valdez. As long as the vessels' operation on the high-seas is "rationally related" to their operation in Valdez, all of the vessels' value arising from the whole of these operations may be subject to apportionment. Arguments surrounding this requirement should have no direct bearing on the second question presented by this Court: "[w]hether an *ad valorem* property tax that apportions the property's value in proportion to its physical presence and commercial activities in each tax situs violates the Commerce Clause or the Due Process Clause." The Court's inquiry concerns the validity of the apportionment formula, not the scope or sum of the value to which it has been applied.

Though the "rational relationship" requirement may not bear directly on the Court's second inquiry, it does have an indirect bearing. It establishes the scope of the tax base that may be subject to apportionment. In this case, that base should be the value arising from the operation of the vessels. But the Taxpayer's argument that the value of assets *must* be apportioned according to the assets' daily location is tantamount to an argument for geographic accounting as opposed to apportionment.[12] The value arising from employment of an asset in a unitary operation does not necessarily arise evenly wherever the asset is located and however the asset is engaged in those locations. To argue that certain asset value

[12] *See,* Brief for the Petitioner, Polar Tankers, Inc., p. 27.

cannot be apportioned to a particular location because the assets were at times located elsewhere (e.g., activity on the high-seas) assumes value can be geographically assigned based on the assets' physical location. This Court has seen through that proposition. "Because the [operational interconnectedness] that generates the assets' value arises from the operation of the business as a whole, it becomes misleading to characterize the [value of the business's assets] as having a single identifiable 'source.'" *Mobil Oil Corp. v. Commissioner of Taxes of Vermont*, 445 U.S. at 438. The Taxpayer's proposal in this case would amount to carving out a property tax exemption, an exception to the base of apportionable value, for that value that arises during the time the property is on the high-seas.

B. The Fair Apportionment Requirement is Met

The "nexus" and "rational relationship" requirements of the due process clause guide us in determining the scope of value or income subject to apportionment. They do not directly touch on the apportionment formula, which is the subject of this Court's inquiry. But another requirement of the due process clause does address the apportionment formula directly. That is the requirement of "fair apportionment." *Container Corporation, supra* at 166. Although this Court has often related the fair apportionment requirement to due process, it is actually more of a commerce clause concern. The Court explained in *Oklahoma Tax Comm'n* v. *Jefferson Lines*, 514 U.S. 175 (1995) that "this principle of fair share is the lineal descendant of *Western Livestock*'s prohibition of *multiple taxation*, which is threatened whenever one state's act of overreaching combines with the possibility that another State will claim its fair share of the value taxed: the portion of value by which one State exceeded its fair share would be *taxed again* by a State properly laying claim to it." 514 U.S. at 184-185 (1995) (emphasis added), *referring to, Western Live Stock v. Bureau of Revenue*, 303 U.S. 250 (1938). Aside

from the arguable existence of a home-port rule, which is discussed below with respect to the commerce clause, the Taxpayer is not claiming any potential for taxation by multiple jurisdictions in this case. Rather, the Taxpayer is concerned that the City is taxing a proportionate share of value that arises *outside* of any other taxing jurisdiction.

For an apportionment formula to be fair, it must be both internally and externally consistent. *Container Corporation, supra* at 169. Internal consistency requires a formula that "if applied by every jurisdiction, … would result in no more than all of the unitary business' [value] being taxed." *Id.* The City's formula clearly meets the internal consistency test. If all jurisdictions used the port-day formula, all business value would be taxed and no more. Clearly, exclusion of outer-jurisdictional activity, by itself, would never cause an apportionment formula to fail the internal consistency test. All value would be taxed under a port-day formula and no more. In contrast, if all jurisdictions were required to apply a formula that includes outerjurisdictional property, as the Taxpayer and its *amici* suggest, some business value would never be subject to tax. There would always be less than full apportionment of the tax base.

External consistency requires "that the factor or factors used in the apportionment formula must actually reflect a reasonable sense of how income [or value] is generated." *Id.* Undoubtedly, all activities of a unitary business contribute to the value of its assets and realization of its income. *Hans Rees' Sons, Inc. v. North Carolina*, 283 U.S. 123, 133 (1931). But no apportionment formula attempts to include all factors reflecting all activity, and a requirement to do so would certainly defeat the usefulness of formulary apportionment as a "rough approximation" of the share of total activity occurring in a jurisdiction, and thus the share of value or income arising from the jurisdiction. *Id.* at 271.

The UDITPA three-factor formula, which this Court has recognized as a "benchmark against which other formulas are to be measured," includes only three types of taxpayer activity: property, payroll and sales. *Container Corporation* at 170. These three factors do not exhaust the entire set of factors arguably relevant to the production of income. *Id*. at 170, fn. 20. And none of these three factors is included in its entirety. The property factor excludes intangible property;[13] the payroll factor has been read to exclude independent contractors;[14] and the sales factor reassigns sales made to the U.S. government on the basis of origination rather than destination.[15] Indeed, this Court acknowledged that "[s]ome methods of formula apportionment are particularly problematic because they focus on only a small part of the spectrum of activities by which value is generated." *Container Corporation* at 170. Nonetheless, this Court has "generally upheld the use of such formulas…" *Id., citing to Moorman Mfg. Co. v. Bair, supra* (upholding a single sales factor formula and its application to a specific taxpayer); *Underwood Typewriter Co.* v. *Chamberlain,* supra (upholding a single property factor formula, which did not include intangible property, and its application to a specific taxpayer). *See also, Hans Rees' Sons, Inc.* v. *North Carolina, supra* at 134 (holding a single tangible property factor to be "fair on its face," but rejecting its application to a specific taxpayer in a particular case as distortive.)

The specific port-day formula at issue in this case does not purport to reflect all activity that might give rise to value. It reflects port-day activity. It does not reflect a myriad of other activities, including activity on the high-seas. As such, the formula simply falls somewhere on this continuum be-

---

[13] UDITPA § 10 (defining the property factor).

[14] UDITPA §§ 13 and 14 (defining the payroll factor). *See also* Multistate Tax Commission Regulation IV.13(a)(3).

[15] UDITPA § 16(b)(2).

tween the relatively robust spectrum of activity included in a three-factor formula and the more circumspect spectrum of activity included in a single-factor formula. Taxpayer's proposed formula is also a single factor formula, and would also fall somewhere on this continuum. The City's formula is not "intrinsically arbitrary." It provides a rough approximation of the value attributable to the City. The City might have chosen an alternative, such as that suggested by the Taxpayer, but the City has determined through its legislative process that the port-day formula reflects the most relevant activity and is the better approximation.

To be sure, the more narrow the spectrum of activity included in an apportionment formula, the more likely the formula will fail to reflect a particular taxpayer's relative amount of activity in the taxing state. This Court held in *Hans Rees'* that "when the [jurisdiction] has adopted a method *not intrinsically arbitrary*, it will be sustained until proof is offered of an unreasonably and arbitrary application *in particular cases*." *Id.* at 133 (emphasis added). And indeed, this Court has "on occasion found the distortive effect of focusing on only one factor so outrageous in a particular case as to require reversal." *Container Corporation, supra at* 182-183; *referring to Hans Rees' Sons, Inc. v. North Carolina ex rel. Maxwell, supra*. In this case, Polar Tankers has failed to meet its burden to show by clear and cogent evidence that the Valdez apportionment formula results in an assessment of Polar Tankers that is "out of all appropriate proportion to the business transacted by the appellant in that State."[16] *Hans Rees' Sons v. North Carolina ex rel. Maxwell,* 283 U. S. at 135.

Like the "benchmark" UDITPA three-factor formula, as well as the formula proposed by Taxpayer in this case, the City's formula will occasionally over-reflect or under-reflect

[16] Brief for Respondent, City of Valdez, pp. 34-40,

value attributable to the City. The formula could under-reflect value to the extent inclusion of some other contributing activity, such as freight handling or payroll, has a relatively stronger presence in the jurisdiction. The Taxpayer's proposed formula, a ratio of port-days to all days, could over-reflect value to the extent the activity reflected by some of those days (e.g., the days at sea) does not give rise to as much value as the activity reflected by other days (e.g., the days in port).

In *Container Corporation*, this Court recognized that the relationship between the activity reflected by a particular factor and the income that activity generates is assumed to be roughly the same for the included factors: "The three-factor formula … is based in part on the very rough economic assumption that rates of return on property and payroll – as such rates of return would be measured by an ideal accounting method that took all transfers of value into account – are roughly the same in different taxing jurisdictions." *Id.* at fn. 20. The City's apportionment formula here assumes - with justification - that inclusion of days on the high seas in equal proportion to days in port would attribute too much value to days at sea and not enough value to days in port.

Despite the potential for occasional over- or under-reflection of value, "[t]he constitution does not invalidate an apportionment formula whenever it *may* result in taxation of some [value] that did not have its source in the taxing [jurisdiction]." *Id. at 169-170, citing and adding emphasis to Moorman Mfg. Co. v. Bair, supra* at 272. And in this case, Taxpayer is not claiming the value had its source in another "taxing [jurisdiction]" at all. It is claiming the source for some of its income is *not* in any jurisdiction. Aside from the "home-port" question, which is analyzed below with respect to the commerce clause, there is no potential in this case for the type of multiple taxation that gave rise to the due process concern for fair apportionment in the first place. *Oklahoma*

Tax Comm'n v. *Jefferson Lines*, *supra* at 184-185 (1995); *Western Live Stock v. Bureau of Revenue*, *supra*.

II. The Commerce Clause Does Not Require Outer-jurisdictional Taxpayer Activity to be Reflected in State and Local Apportionment Formulas

The 10th Amendment to the U.S. Constitution limits the federal government's power to regulate to only those matters specifically delegated to it. U.S. Const., amend. X. Other powers are reserved to the states, or to the people. One such federal delegation is contained in the commerce clause, which reserves for Congress the exclusive power "… [t]o regulate Commerce with foreign Nations, and among the several States..." U.S. Const. Art. I, §8, cl. 3. This explicit delegation has long been held to contain a negative inference, restricting State authority, even in the absence of an explicit federal regulation, if the state action would improperly discriminate against or burden interstate commerce. *See, e.g.*, *Quill Corp. v. North Dakota, supra at* 312-313.

The purpose of the commerce clause, and thus the dormant commerce clause, is to prohibit state actions that discriminate against interstate commerce by burdening out-of-state competitors. *See, e.g., Reeves, Inc.* v. *Stake*, 447 U.S 429, 437 (1980); *New Energy Co. of Indiana* v. *Limbach*, 486 U.S. 269, 273-274 (1988) ("[The] 'negative' aspect of the Commerce Clause prohibits economic protectionism – that is, regulatory measures designed to benefit in-state economic interests by burdening out-of-state competitors" (citations omitted)); *General Motors* v. *Roger W. Tracy, Tax Commissioner of Ohio*, 519 U.S. 278, 299 (1997) (referring to "…the dormant Commerce Clause's fundamental objective of preserving national markets for competition undisturbed by preferential advantages conferred by a State upon its residents or resident competitors").

A. Regulation of State and Local Apportionment Formulas is Best Achieved through State and Local Legislation

The commerce clause affords Congress ample authority to regulate certain aspects of state taxation. This Court specifically suggested in *Moorman* that one of those aspects would potentially be the policy at issue in this case: the appropriate composition of activities included in state apportionment formulas. *Moorman Mfg. Co. v. Bair*, *supra* at 280. According to this Court in *Moorman,* if Congress were substantially convinced that the freedom of states to formulate independent policy in this area must yield to an overriding national interest in uniformity, it could so legislate, consistent with the strictures of the commerce clause. *Id*.

Indeed, Congress has seriously considered doing so. The Willis Committee Report, a 1965 congressional study of state taxation interstate and international commerce mandated by Title II of Pub. L. No. 86-272, 73 STAT. 555, 556 (1959), made extensive recommendations as to how Congress could regulate state corporate income and franchise taxation of interstate and foreign commerce.[17] The Report recommended, among other things, federal legislation to establish a uniform state apportionment formula (based on two equally-weighted factors, property and payroll) and a uniform state tax base (set at federal taxable income).[18] UDITPA and the Multistate Tax Compact were the states' answer to these Congressional recommendations. *See, e.g.,* H.R. Rep. No. 89-952, Pt. VI, at 1143 (1965). Ultimately, after due consideration of all the

---

[17] *See, generally, Interstate Taxation Act: Hearings on H.R. 11798 and Companion Bills Before Special Subcomm. on State Taxation of Interstate Commerce of the House Comm. on the Judiciary*, 89th Cong., 2d Sess. (1966).

[18] H.R. Rep. No. 952, 89th Cong., 1st Sess., Pt. VI, at 1139*ff* (1965).

political and economic interests that vary from state to state, Congress chose not to regulate or pre-empt the states' ability to set their own apportionment formulas or tax bases.

This Court recognized in *Moorman* that the choice of factors to be included in an apportionment formula is fundamentally a legislative one, and that the difficulty of stepping in where states or local jurisdictions have legislated, and Congress has chosen not to, is prohibitive:

> Accepting appellant's view of the Constitution would require extensive judicial lawmaking. Its logic is not limited to a prohibition on use of a single-factor apportionment formula… a host of other division-of-income problems create precisely the same risk and would similarly rise to constitutional proportions.
> *Id.* at 278.

This Court is not the appropriate forum for weighing local benefits and industry activities and determining how those should be reflected in an apportionment formula. Concerns raised by *amici* regarding which particular activities should be reflected in an apportionment formula are best addressed in state and local legislative processes. Indeed, the Uniform Law Commission is currently considering a cooperative joint project to review its model UDITPA.[19] The Multistate Tax Commission is working simultaneously with the Uniform Law Commission to consider amendments to Art. IV of the Compact, which incorporates UDITPA. These are the better types of forums for considering which activities should be reflected in an apportionment formula.

---

[19] Information regarding this project is available from the Uniform Law Commission at:
http://www.nccusl.org/Update/CommitteeSearchResults.aspx?committee=302

B. The Dormant Commerce Clause Does Not Require Outerjurisdictional Taxpayer Activity to be Reflected in State and Local Apportionment Formulas

The dormant commerce clause prohibits taxation that results in "discrimination against interstate or foreign commerce." *Container Corporation, supra at 170, citing Mobil Oil Corp., supra,* at 444. This Court has long-identified the potential for multiple taxation as the essence of discrimination and burden on interstate commerce. *Japan Line, Ltd.* v. *County of Los Angeles,* 441 U.S. 434, 444 - 448 (1979). The dormant commerce clause might have been construed to impose a requirement on the states that the combination of different apportionment formulas never result in a tax burden higher than what the taxpayer would have incurred if its business were limited to any one of the two jurisdictions. But according to this Court in *Container*, "at least in the interstate commerce context … the antidiscrimination principle has not in practice required much in addition to the requirement of fair apportionment." *Container Corporation, supra at* 170-171. In essence, the Court has recognized fair apportionment as the solution to the potential for multiple taxation. "In order to prevent multiple taxation of interstate commerce, this Court has required that taxes be apportioned among taxing jurisdictions, so that no instrumentality of commerce is subjected to more than one tax on its full value." *Japan Line, Ltd. v. County of Los Angeles, supra* at 446- 447.

Taxpayer raises the specter that a vestige of the "home-port" doctrine carves out non-jurisdictional income or assets from the pool of tax base subject to apportionment. The fair apportionment solution could be frustrated if there were a home-port rule applicable to interstate commerce. But there is not.[20] "The corollary of the apportionment principle, of

[20] *See,* Brief of Petitioner, City of Valdez, pp. 14-15, 48.

course, is that no jurisdiction may tax the instrumentality in full. The rule which permits taxation by two or more states on an apportionment basis precludes taxation of all of the property by the state of the domicile… otherwise there would be multiple taxation of interstate operations." *Standard Oil Co. v. Peck*, 342 U.S. 382, 384-385 (1952) (income); *See also, Mobil* (income)("Taxation [of income] by apportionment and taxation by allocation to a single situs are theoretically incommensurate, and if the latter method is constitutionally preferred, a tax based on the former cannot be sustained."). *Accord*, *Japan Lines* (property), *supra*.

Because there is no home port rule applicable to interstate commerce, a determination by this Court that outerjurisdictional activity must be included in the apportionment formula would systematically result in less than full apportionment of income or value. Such a rule would go far beyond ensuring that interstate commerce is not disadvantaged. It would create an advantage. Taxpayers with outerjurisdictional property would be provided an anti-competitive tax advantage through the operation of the apportionment formula. For example, to the extent ocean transportation may compete with railroad, truck or air transport, ocean transport would be competitively advantaged. Railroads and trucks operate by necessity only within jurisdictions. Airlines often use a formula similar to a port-day formula. *Braniff Airways, Inc. v. Nebraska State Bd. of Equalization and Assessment*, 347 U.S. 590 (1954). The creation of this sort of tax advantage for ocean transport would not further the purpose of the commerce clause, which is to preserve competitive national markets. *General Motors* v. *Tracy*, *supra* at 299.

CONCLUSION

The Commission supports the position of the City of Valdez that the port-day formula is fair and does not discriminate against interstate commerce. The Taxpayer's expansive in-

terpretation of the dormant commerce and due process clauses to require inclusion of a particular type of activity in a jurisdiction's apportionment formula would result in unnecessary and burdensome interference with state sovereignty in violation of federalism principles and an anti-competitive tax advantage for certain taxpayers. The judgment of the Supreme Court of Alaska on this ground should be affirmed.

Respectfully submitted,

Joe B. Huddleston, Executive Director
Shirley K. Sicilian, General Counsel
Counsel of Record
Multistate Tax Commission
444 No. Capitol St., N.W., Suite 425
Washington, D.C. 20001-1538
(202) 624-8699

March 4, 2009